United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1576

ORIGINAL

United States Court of Appeals

For the Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES F. HEIMERLE and
RICHARD G. WARME,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT JAMES F. HEIMERLE

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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REPLY BRIEF OF DEFENDANT-APPELLANT JAMES F. HEIMERLE

The government fails to meet the thrust of defendant-appellant Heimerle's brief on appeal and, in the course of responding, either ignores his points or answers on a mistaken view of the record below and the law applicable to the facts.

I

Answering Point VII (Resp. Br. p. 33)

Appellant Heimerle has argued that the doubling of his sentence from a maximum of five years to a ten year sentence under the provisions of the "dangerous special offender" law deprived him of due process of law on a number of different levels. Respondent has failed to meet these contentions.

The government simply did not follow the provisions of

the statute (§3575). The court stated in United States v. Stewart, 531 F.2d 326, 332 (6 Cir. 1976) cert. den. 426 U.S. 922 (1976):

> "Thus in §3575, quoted above, the statute requires notice to the defendant of the Government's intention to seek an 'increased sentence' a reasonable time before trial of the crime. That notice must also set out 'with particularity' why the Government believes the defendant is a dangerous special offender.' After the defendant has pled or been found guilty, there must be a specific 10-day notice of a hearing to be held 'before sentence is imposed.' * * *
>
> * * *
>
> 'Due process, in other words, requires that he [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.'"

The government in the case at bar in no way complied with the Stewart requirements. Heimerle was found guilty by the jury of one count of conspiracy to violate 18 U.S.C. §371 on October 1, 1971. The government, however, failed thereafter to move to have the notice to proceed under 18 U.S.C. §3575(a) (A-9-13) until November 11, 1976, even though Heimerle's sentencing was set for November 15, 1976. In so doing the government failed to comply with the mandatory 10-day notice required to be given a defendant prior to a hearing. Respondent does not and cannot meet this deficiency in the timing of the notice, except to say that Heimerle's counsel knew about the government's intention to

file such a notice in advance of the filing (Resp.Br. p. 43).

The statute requires that the notice set out "with particularity why the Government believes the defendant is a dangerous special offender." There is no such statement particularizing why the defendant is "dangerous" in the Notice served and filed (A-9-13). This is a second reason why the procedure was invalid in this case.

The statute further provides for a two-tier hearing for a defendant. On one level the court must hold an evidentiary hearing so that it may determine by the preponderance of the evidence whether or not the evidence adduced at the hearing establishes the status of the defendant as a dangerous special offender; on the second level the court should consider the elements relating to additional prison time to be appropriately allotted.

Much has been written by legal scholars on this issue. See "The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals", 89 H.L.R. 356, 358 (1975).

> "Although reduced procedural rigor in the context of ordinary sentencing was approved by the Supreme Court in Williams v. New York [337 U.S. 241 (1949)], ordinary sentencing is distinguishable from two-tiered sentencing in two respects. First, two-tiered statutes delineate with specificity the findings which must be made by the sentencing judge. Second, the defendant may be deprived of his liberty for a period significantly longer than the maximum authorized by the triggering crime." (A-386, 387)

In the case at bar, the only evidence offered at the so-called hearing on the issue of whether the defendant was a special dangerous offender was a series of certified copies of convictions and reports of hearsay probation officer conclusions noted by the judge but not received in evidence (A-364-372). In the court's "Opinion and Findings", it found that defendant was a "recidivist". It found that

> "[D]efendant's past record and present demeanor warrant the findings (1) that the defendant has committed a series of felonies within the statutory time frame or conspired to do so, and (2) that the defendant is a dangerous offender within the contemplation of the statute. There is no need for a psychiatric evaluation of defendant's mental state to reach a fair inference which is made herein that the defendant is dangerous. See 89 Harvard Law Review 357, note 10;* 18 U.S.C. Section 3575(f) 1970; Model Penal Code, Section 7.03(2), 7.04(2) (Approved Draft 1962)."

The trial court further misspoke when it said:

> "The notice which preceded the hearing duly specified and the Court finds that the defendant is a dangerous special offender . . ." (A-387)

Again there was no specific statement in the notice that the defendant was "dangerous" except in the conclusory language of the statute. The court went on with its findings to state:

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*Note 10 referred to is inapposite since it concerns §3575 (e) (2), (3), sections not relied upon by the government in its case against Heimerle [criminal pattern of conduct which brought in a substantial source of income and leader of a conspiracy].

> "This defendant will pose a danger to other persons in the community. He probably is suffering from a severe personality disorder indicating a propensity toward criminal activity. [A-391]
>
> * * *
>
> The presentence report to the Court which the defendant has examined covers the defendant's background, character and behavior pattern over a substantial period of time antedating the felony which brought him before this court. This was appropriate information to be considered hereon. 18 USC Section 3577." (A-392)

It is thus clear from the court's findings, themselves, that the court considered hearsay from the probation report as evidence on the first of the two-tiered issues as to whether or not the defendant was a dangerous special offender. This violated the due process requirements outlined by the Supreme Court in Specht v. Patterson, 386 U.S. 605 (1967). The defendant in the case at bar was not confronted with the witnesses against him on the new fact issues to be found. He could not cross-examine the probation officer whose adverse findings (to him) influenced the court in deciding to impose the additional years of prison penalty.

Moreover, the case at bar is distinguishable from the recent case of United States v. Neary, 552 F.2d 1184 (7 Cir. 1977). In Neary the court relied for its finding on testimony of government agents. Moreover the defendant-appellant there conceded the adequacy of the finding under §3575 (e) (1). Defendant here makes no such concession. Moreover, defendant

further relies on the argument that, as construed by the court below in this case, there were insufficient standards and evidence for a finding of "dangerous".

As argued in appellant's brief previously filed, additional special factors make the dangerous special offender finding invalid and the increased sentence unconstitutional. One of the convictions considered by the trial court has been set aside on collateral challenge since the finding was made (See Resp. Br. p. 38). The increased sentence, itself, was predicated on facts brought out in a prior case before Judge Metzner which paralleled in point of time and location the same events involved in the conspiracy conviction in the case at bar. Thus considerations of double jeopardy as to sentence (not trial) make the increased sentence unconstitutional. See Jeffers v. United States, ___U.S.___(decided June 16, 1977); United States v. Golay, ___F.2d ___ (8 Cir., decided June 24, 1977).

The government does not meet any of the points above discussed on the issue of sentence and, in all events, the defendant should be returned to the District Court for resentencing if the judgment is otherwise affirmed.

II

Answering Point III B (Resp. Br. p. 24)

Appellant Heimerle charged error of Constitutional proportions in the admission in evidence of the co-defendant

Warme's confession when placed against the record wherein it appeared that Heimerle, instead of Warme, had confessed and the prosecutor argued in summation to the jury that the Warme confession had implicated all the co-conspirators including the co-defendant Heimerle.*

Respondent counters with an erroneous blanket statement, viz.:

> "The redacted confession was not objected to in any way by Heimerle, nor did he object to its admission in evidence (Tr. 468)."
> (Resp. Br. p. 24)

On page 444 of the Transcript, Heimerle's counsel renewed his objection to the redacted version of the confession.

On page 453, counsel for Heimerle attempted to make specific further objections to the redacted confession. The trial court met that in the following manner:

> "THE COURT: All right. The form in which this is redacted is the form in which it will be allowed --
>
> MR. POLLACK: There are two more points, your Honor. I would like to bring --
>
> THE COURT: That's it. If there are any more points, you will take them up on appeal."
> (453)

Following this, Mr. Pollack attempted to put on the record what the objections were. In addition, the government objected and

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* This, of course, was true, but the Bruton rule made such a characterization by the prosecutor improper.

the court then said to both counsel:

> "I am giving you a total objection to everything that is going on. Please do not say anything further."

III

Answering Point VI (Resp. Br. p. 31)

Appellant Heimerle has argued that the sole reason the two prior counterfeiting convictions of Heimerle were admitted in evidence was to show the defendant's criminal character and to prejudice the jury against him. This was made clear by the government's summation, viz.:

> "I submit to you, ladies and gentlemen, that we have evidence here before us that he [Heimerle] has structured [sic] once again or participated once again in the illegal enterprise aimed at the sale of counterfeits like he was convicted of twice before." (542, A-291)

The argument that the prosecuting attorney made in his summation made clear his purpose in introducing the prior convictions. It was to show the defendant's propensity for crime. Nothing in respondent's brief rebutted this conclusion.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Defendant-
Appellant Heimerle

2 Copies Received

Date October 7, 1977

Firm Hon. Robt. B. Fiske, Jr.

By _____